STATE OF MICHIGAN

COURT OF APPEALS

JAMES T. ZYREK and KAREN L. ZYREK,

Plaintiffs-Appellants,

V

COSTCO WHOLESALE CORPORATION d/b/a COSTCO STORE #393,

Defendant-Appellee,

and

NICK PIETILA,

Defendant.

UNPUBLISHED
June 26, 2014

No. 313907
Oakland Circuit Court
LC No. 2011-121064-NO

Before: DONOFRIO, P.J., and GLEICHER and M.J. KELLY, JJ.

PER CURIAM.

In this premises liability action, plaintiffs appeal as of right from an order dismissing their claims and granting summary disposition in favor of defendant.[1] Because the trial court did not err in determining that there was no genuine question of fact that the ice at issue was open and obvious, we affirm.

I. BASIC FACTS

[1] Our use of the term "defendant" in this opinion will refer to Costco Wholesale Corporation. The other named defendant in this suit, Nick Pietila, previously was dismissed as a party through a stipulated order.

On January 20, 2009, plaintiff James T. Zyrek[2] drove himself and a friend to defendant's store in Madison Heights. Plaintiff wanted to visit defendant's tire department in order to have a leak repaired in a tire he previously purchased from defendant.

Plaintiff arrived at Costco a little before 1:00 p.m. and parked in the designated parking area for customers who were using the tire department. This designated area was located along the north side of the store. People parked there and walked east along the face of the building to reach the tire department. The tire department had many bay doors, where cars would be pulled into for servicing. After parking, plaintiff noticed that there was snow on the grass areas near the parking lot, but after examining the lot in the vicinity of his car, he thought it appeared to be dry and "looked pretty good." Because plaintiff determined that the parking lot initially looked "good," he did not look down at the ground as he walked along the building.

After plaintiff walked past the first bay door and reached the second bay door, he slipped on some ice and fell to the ground. Plaintiff explained that he was looking forward and not looking down at the ground at the time and did not see any ice. But after being helped up, plaintiff looked down and was able to see the patch of ice, which he described as spanning the width of the second bay door and being approximately 20 feet long.

Plaintiff walked inside the store and informed Melody Petty, who was a manager, of what happened. Both of them came out to look at the area, and neither had any difficulty in seeing the ice. Additionally, approximately five minutes after plaintiff fell, an employee of defendant took some photographs of the area. The photographs were taken from the east side of the patch of ice facing west and clearly show the patch of ice as being visible. Employee James Pokornicki testified that in the winter, because the inside of the bays are warm, ice and snow will melt off of the vehicles they bring inside and that water will run out of the bays and later freeze outside. Nick Pietila, who also worked in the tire department, testified that the icy area in question was salted three times that day before plaintiff fell, with Pietila personally applying the salt one of those times.

Plaintiff filed the instant complaint against defendant on August 15, 2011. Defendant later moved for summary disposition pursuant to MCR 2.116(C)(10), arguing that the hazard was open and obvious. Plaintiff argued that the danger was not open and obvious because it was "black ice" and because defendant created the hazard. Plaintiff also argued that the fact that defendant created the hazard constituted a "special aspect" that made the open and obvious doctrine inapplicable.

The trial court ruled that the ice was open and obvious and that plaintiff failed to prove that any special aspect existed. Consequently, the trial court granted defendant's motion for summary disposition.

II. ANALYSIS

[2] Because plaintiff Karen Zyrek's claims are derivative of plaintiff James Zyrek's claims, our use of the singular term "plaintiff" will refer only to James.

We review a trial court's decision on a motion for summary disposition made under MCR 2.116(C)(10) de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). When deciding a motion for summary disposition under this rule, a court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence then filed in the action or submitted by the parties in the light most favorable to the nonmoving party. MCR 2.116(G)(5); *Wilson v Alpena Co Rd Comm'n*, 474 Mich 161, 166; 713 NW2d 717 (2006). The motion is properly granted if the evidence shows that there is no genuine issue regarding any material fact and that the moving party is entitled to judgment as a matter of law. *Sanders v Perfecting Church*, 303 Mich App 1, 4; 840 NW2d 401 (2013).

Plaintiff first argues that the trial court erred in granting defendant's motion for summary disposition because the open and obvious doctrine does not apply to claims of ordinary negligence. Premises liability concepts, such as the open and obvious doctrine, do not apply in ordinary negligence actions. *Wheeler v Central Mich Inns, Inc*, 292 Mich App 300, 304-305; 807 NW2d 909 (2011). Thus, if plaintiff's claim sounded in ordinary negligence, instead of premises liability, then he would be correct.

When determining the nature of a plaintiff's claim, "[c]ourts are not bound by the labels that parties attach to their claims." *Buhalis v Trinity Continuing Care Servs*, 296 Mich App 685, 691; 822 NW2d 254 (2012). In fact, "[i]t is well settled that the gravamen of an action is determined by reading the complaint as a whole, and by looking beyond mere procedural labels to determine the exact nature of the claim." *Adams v Adams (On Reconsideration)*, 276 Mich App 704, 710-711; 742 NW2d 399 (2007).

Further, "[i]f the plaintiff's injury arose from an allegedly dangerous condition on the land, the action sounds in premises liability rather than ordinary negligence; this is true even when the plaintiff alleges that the premises possessor created the condition giving rise to the plaintiff's injury." *Buhalis*, 296 Mich App at 692. Here, plaintiff's complaint clearly establishes that the action is one of premises liability. He alleged that he was injured as a result of slipping and falling on ice in defendant's parking lot. Accordingly, plaintiff's claim is one of premises liability, and the open and obvious doctrine is applicable.

Plaintiff next argues that the trial court erred in determining that the ice hazard was open and obvious.

"In a premises liability action, a plaintiff must prove the elements of negligence: (1) the defendant owed the plaintiff a duty, (2) the defendant breached that duty, (3) the breach was the proximate cause of the plaintiff's injury, and (4) the plaintiff suffered damages." *Benton v Dart Props, Inc*, 270 Mich App 437, 440; 715 NW2d 335 (2006). The specific duty that a landowner owes to those who enter the landowner's land is determined by the status of the visitor. *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 596; 614 NW2d 88 (2000). Michigan recognizes three traditional categories of visitors: trespasser, licensee, and invitee. *Id.* The parties do not dispute that plaintiff was an invitee. "With regard to invitees, a landowner owes a duty to use reasonable care to protect invitees from unreasonable risks of harm posed by dangerous conditions on the owner's land." *Hoffner v Lanctoe*, 492 Mich 450, 460; 821 NW2d 88 (2012) (footnote omitted). However, this duty does not require a landowner to protect an invitee from dangers that are "open and obvious." *Benton*, 270 Mich App at 440-441. Open and

obvious dangers cut off a landowner's duty because "there is an overriding public policy that people should 'take reasonable care for their own safety' and this precludes the imposition of a duty on a landowner to take extraordinary measures to warn or keep people safe unless the risk is unreasonable." *Buhalis*, 296 Mich App at 693-694, quoting *Bertrand v Alan Ford, Inc*, 449 Mich 606, 616-617; 537 NW2d 185 (1995); see also *Anderson v Wiegand*, 223 Mich App 549, 554; 567 NW2d 452 (1997) (stating that a "possessor of land is not an absolute insurer of the safety of an invitee").

Whether a hazard is open and obvious is preliminarily a question of law. *Knight v Gulf & Western Props, Inc*, 196 Mich App 119, 126; 492 NW2d 761 (1992), citing *Riddle v McLouth Steel Products Corp*, 440 Mich 85, 95-97; 485 NW2d 676 (1992). A danger is open and obvious even if the plaintiff did not know of its existence, but "an average user with ordinary intelligence" would have discovered it and the risk presented upon casual inspection. *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 475; 499 NW2d 379 (1993); see also *Bertrand*, 449 Mich at 611 ("[T]he open and obvious danger doctrine will cut off liability if the invitee should have discovered the condition and realized its danger.").

We conclude that the trial court did not err in determining that the patch of ice was open and obvious. The evidence established that at least four different people had no problem seeing the patch of ice, including plaintiff. Plaintiff admitted that he could see it when he looked down at the ground, Pokornicki and Pietila testified that they could see the patch of ice, and plaintiff testified that the ice was visible to the manager, Petty. Furthermore, the photographs submitted to the trial court show that the ice was visible upon casual inspection.

Plaintiff claims on appeal that while the hazard may have been visible from these other perspectives, it was not visible to plaintiff when he was approaching the hazard from the west. However, plaintiff failed to offer any evidence to support this assertion. Plaintiff testified that he was not looking at the ground while walking in front of the bay doors. Importantly, he also admitted that he did not know if he would have been able to see the ice had he been looking at the ground. Thus, plaintiff's position, that the hazard was "black ice" and unable to be seen from plaintiff's western vantage point, is mere speculation and not supported by the record. In other words, plaintiff failed to present evidence beyond mere speculation supporting that the hazard was not identifiable upon casual inspection because the evidence shows that plaintiff never inspected, let alone casually inspected, the premises. Thus, when viewing the evidence, even in a light most favorable to plaintiff, there is no genuine issue of fact that the hazard was discoverable upon casual inspection. See *Karbel v Comerica Bank*, 247 Mich App 90, 97-98; 635 NW2d 69 (2001) (stating that more than conjecture or speculation is necessary to survive a motion for summary disposition).

Plaintiff also vaguely refers to findings from an expert witness, Terence W. Campbell. However, no such evidence was submitted to the trial court, and parties are precluded from expanding the record on appeal. *Sherman v Sea Ray Boats, Inc*, 251 Mich App 41, 56; 649 NW2d 783 (2002). The only documents that plaintiff submitted to the trial court were the same documents that defendant submitted: plaintiff's deposition, photographs of the scene of the fall, Pokornicki's deposition, and Pietila's deposition. Consequently, we will not consider any "evidence" pertaining to the expert. We also note that in his reply brief on appeal, plaintiff suggests that he was denied the opportunity to present the expert's evidence to the trial court.

However, plaintiff never listed this particular issue in his statement of the questions presented on appeal and, therefore, has abandoned the issue. *Lash v Traverse City*, 479 Mich 180, 201 n 6; 735 NW2d 628 (2007), citing MCR 7.212(C)(5). Moreover, we also note that even if he did raise the issue on appeal, the issue was never preserved at the trial court for appellate review because he raised it for the first time in his motion for reconsideration.[3] *Vushaj v Farm Bureau Gen Ins Co of Mich*, 284 Mich App 513, 519; 773 NW2d 758 (2009).

Plaintiff next argues that even if the hazard was open and obvious, the doctrine should not apply because of the presence of "special aspects." It is true that if there are "special aspects" that make an open and obvious condition "unreasonably dangerous," then the premises possessor's duty to warn or repair remains intact. *Lugo v Ameritech Corp*, 464 Mich 512, 517; 629 NW2d 384 (2001). There are two types of special aspects that will render an otherwise open and obvious hazard actionable: the hazard is "effectively unavoidable" or poses "an unreasonably high risk of severe harm." *Id.* at 518. Neither aspect is present in the instant case. Slipping and falling on an ordinary parking lot does not present an unreasonably high risk of severe harm. Further, plaintiff did not have to encounter the hazard – he could have stepped around the affected area. In fact, when plaintiff finally left the premises and had to walk past the same area to return to his car, he successfully noticed the icy area and was able to avoid it. He agreed that there was "ample space to walk around it." Therefore, no "special aspects" existed with regard to the hazard.

Plaintiff finally seems to imply that summary disposition was not proper because defendant had notice of the icy hazard. While a landowner does owe a duty to protect invitees if the landowner has notice of a hazard, *Hoffner*, 492 Mich at 460; *Stitt*, 462 Mich at 597, plaintiff offers no authority that such notice would circumvent the well-established open and obvious doctrine. A party's failure to cite to any supporting legal authority for its position results in the issue being abandoned. *Berger v Berger*, 277 Mich App 700, 715; 747 NW2d 336 (2008). Regardless, it is clear to us that a landowner's notice of a hazard is irrelevant when the hazard is open and obvious. See *Lugo*, 464 Mich at 516 (noting that "the open and obvious doctrine should not be viewed as some type of "exception" to the duty generally owed invitees, but rather as an *integral* part of the definition of that duty") (emphasis added). Thus here, because the hazard was open and obvious and because there were no special aspects present, defendant had no duty to protect plaintiff from the hazard.

Affirmed. Defendant, as the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Pat M. Donofrio
/s/ Elizabeth L. Gleicher
/s/ Michael J. Kelly

[3] And even then, plaintiff still failed to provide any documentary evidence related to the expert.